



# SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

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## Complete Disclosure in Real Estate is Key

*A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.*

**Lord Millett**

*Bristol & West Building Society v Mothew*

The Supreme Court of Canada set out the characteristics of a fiduciary relationship in the case of *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power;
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The fiduciary duty is one of the most important legal relationships. In such a relationship, the fiduciary owes to his or her principal extreme loyalty. The fiduciary must not put his or her personal interests before the duty owed to the principle.

The realtor seller relationship is a fiduciary relationship. The Ontario Court of Appeal has recognized "... that listing agents and brokers...are fiduciaries owing the highest obligation of full disclosure and fair dealing to the vendor who pays the commission."

All of these issues were recently considered by the Ontario Superior Court of Justice.

### The Facts

Karen Temple and Daniel Donovan, a married couple, listed their Ottawa home with Royal LePage after they decided to move to Newmarket. The couple had previously completed approximately \$100,000 worth of renovations to the home. According to Mary Lindsay, their real estate agent, this had increased the house's value to between \$338,000 and \$340,000.

Despite this initial assessment, this same realtor recommended that the house not be listed for more than \$330,000. The couple reluctantly agreed to list the house for \$329,500. According to Temple and Donovan this was just the first of many compromises that they felt pressured to make.

Two weeks after the house was listed, the realtors informed the couple about Paul Williams, an interested buyer. However, the actual offer was presented by Kelly Williams, a real estate agent who worked out of the same office as Lindsay.

Pursuant to the requirement for disclosure, Lindsay wrote into the offer of purchase and sale the following words, "The buyer, Paul Williams, is the spouse of Kelly Williams - the Royal LePage Team Realty sales representative." However, she did not inform the sellers that the offer had been presented by Paul Williams' wife, Kelly, or that she worked in the same office as Mary Lindsay.

Following some fierce negotiations, Temple and Donovan agreed to a selling price of \$325,000 even though they had not authorized Lindsay to counter the buyers with less than the original asking price.

### The Trial Decision

Justice McKinnon, who heard Temple and Donovan's claim, indicated that he had no hesitation in concluding that a fiduciary relationship existed between the realtor, Lindsay and the sellers, Temple and Donovan. He went on to find that the dis-

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*The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

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# Mediation: There is a Better Way

*Mediate 1. To help opposing sides in a dispute come to an agreement. 2. To bring about (e.g., a settlement) by acting as an intermediary.*

**Webster's II New Riverside Dictionary**

In the legal arena, mediation is an alternative way to resolve a dispute. It allows the parties to resolve their issues in a friendlier and more cost effective manner.

## The Benefits

Aside from the reduced costs, mediation offers the parties a number of benefits including:

- Solutions tailored to better meet the needs of all parties, since the solutions will have been worked out by the parties themselves.
- The opportunity to play an active role in resolving the dispute rather than having one imposed upon them.
- The less formal setting, which allows the parties to feel more comfortable and to speak more openly than in court.
- The promotion of cooperative problem-solving, which may be particularly helpful if the parties are involved in an ongoing relationship.

## The Details

Mediation may be held at any location that is convenient and acceptable to the parties. All parties, including their respective lawyers, must attend the mediation. No one else, however has the right to be present unless the parties' consent.

Each party will be given an opportunity to present their side of the story, to explain what is important to them and to ask questions. The mediator will help the parties to explore the various possibilities for a settlement both in group discussions and in separate meetings.

The length of and number of mediation sessions required will generally depend on the complexity of the case, the preparation of the parties, how close the parties are to an agreement and whether the mediation process is working.

Any agreement reached at mediation is legally binding. If one of the parties fails to abide by the agreement, any other party will have recourse to the courts. If the parties are unable to reach an agreement, the mediation agreement generally provides that any information arising from the mediation remains confidential and cannot be used for any court purpose.

The cost of the mediation will generally be shared equally by all parties. If the mediation arises in the context of the province's mandatory mediation program then the mediator's fee for the three hour session is set by the government.

## Mandatory Mediation Program<sup>1</sup>

Since January 1999, the Ontario court system has instituted a mandatory mediation program in certain judicial districts for many civil litigation and estate matters. Under the Ontario *Mandatory Mediation Program*, cases are referred to mediation in an effort to avoid the pretrial and trial process.

### Rule 24.1 Mediations

Pursuant to Rule 24.1, civil actions in the relevant judicial districts that are subject to case management<sup>2</sup> are referred to mandatory mediation. Certain civil actions, such as family law cases, are excluded from mandatory mediation. In all other cases parties can be exempted from mediation only by a court order.

Rule 24.1 mediations are conducted by a private-sector mediator, selected by the parties within 30 days of the first defence being filed. If the parties cannot agree on a mediator, one will be appointed.

### Rule 75.1 Mediations

Pursuant to Rule 75.1, contested estates, trusts and substitute decisions matters are also referred to mandatory mediation unless a court order exempts the parties.

Rule 75.1 mediations proceed somewhat differently than Rule 24.1 mediations. With these, the applicant is required to bring a motion for directions relating to the conduct of the mediation. At the motion, the court may direct such matters as: the issues to be mediated, who has carriage of the mediation, the timeframe for conducting the mediation, which parties are designated to attend the mediation, how the designated parties are to be notified of the mediation, and how the cost of the mediation is to be shared among the parties. Following the conclusion of the motion, the parties will then select a mediator within 30 days.

Under the *Ontario Mandatory Mediation Program*, parties are not required to continue mediation for more than three hours. Of course, the mediator may end the mediation before that time if the case is settled or if he or she concludes that the process is not constructive for the parties. If the mediation is not concluded within the three hours, the mediator may, with the consent of all parties, continue the session.

see **MEDIATION** on page 4

# Wrongful Dismissal Damages Revisited

A few weeks ago, Canada's top court clarified and redefined some important aspects of the law of damages in the context of employment. The case was *Honda Canada Inc. v. Keays*, 2008 SCC 39 (June 27, 2008).

## The Facts

The case involved Kevin Keays, who had spent his adult years working for the Honda plant in Alliston, Ontario. In 1997, after 11 years with Honda, Keays was diagnosed with chronic fatigue syndrome. He stopped working and began receiving disability benefits. After a year the benefits were discontinued, since the insurer felt that he was ready to return to work.

Upon his return to work he was placed into a program that Honda had instituted for employees who needed to absent themselves from work on a regular basis because of disability. When Keays began to miss work frequently, his employer became concerned and asked him to meet with their occupational medical specialist. Despite his initial willingness to do so, Keays ultimately refused on the advice of his lawyer.

Keays subsequently missed a week of work. When he returned to work, he was given a letter by the employer summarizing their earlier meeting with him, requesting that he see their specialist and indicating that his employment would be terminated if he did not. When he continued to refuse they terminated his employment. Keays sued for wrongful dismissal.

## The Lower Court Decisions

The trial judge concluded that Keays had been wrongfully dismissed and that he had been entitled to 15 months notice. Based on what he described as the "egregious bad faith displayed by Honda in the manner of this termination and the medical consequences flowing therefrom the trial judge increased the notice period to 24 months. In addition, the trial judge found that Honda was part of a conspiracy to interfere with Keays' medical treatment and awarded punitive damages in the amount of \$500,000.

The Ontario Court of Appeal essentially upheld the trial judge's findings and award. It did however, reduce the punitive damage award to \$100,000.

## The Supreme Court of Canada

Although the Supreme Court agreed that Keays had been wrongfully dismissed, they found that the trial judge had made a number of serious factual errors, such that most of the award could not be supported.

As mentioned above, this case provided Canada's highest court with the opportunity to address some of the key issues which should be canvassed in a wrongful dismissal case.

## *The Notice Period*

The first point they addressed was the factors which should be considered in determining the length of the notice period. The Court reiterated the importance of the factors listed in the 1960 Bardal case.

- Character of the employment.
- Length of service.
- Age of the employee.
- Availability of similar employment, having regard to the experience, training and qualifications of the employee.

The Court also reiterated that no one factor was more significant than another and therefore none should be given any disproportionate weight.

## *Damages for Bad Faith Conduct*

The second point involved the "Wallace damages". Wallace was a 1997 Supreme Court of Canada decision that set out the principle that an employee is entitled to additional compensation if there is bad faith conduct in the manner of dismissal. Since that decision, Canadian courts have been awarding Wallace damages by simply extending the amount of notice. The Court referred to this method of calculating damages as "an arbitrary extension of the notice period."

The Court has now clarified that if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be compensated through an award that reflects the actual damages suffered. The Court went on to provide some examples of such conduct, including:

- attacking the employee's reputation by declarations made at the time of dismissal,
- misrepresentation regarding the reason for the decision, or
- dismissal meant to deprive the employee of a pension benefit or other right.

## *Punitive Damages*

A third issue canvassed by the Court was in respect of when punitive damages should be awarded. The Court had this to say, "Damages for conduct in the manner of dismissal are compensatory; **punitive damages are restricted** to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own." (Emphasis added.) The Court further stated that courts should resort to punitive damages only in exceptional cases.

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### DISCLOSURE continued from page 1

closure made by Lindsay in the agreement of purchase and sale was too ambiguous since it did not reveal that Kelly Williams was in fact the agent making the offer on behalf of her husband.

The Real Estate Council of Ontario came to a similar conclusion after conducting an investigation of the complaint lodged against Lindsay. The Council found that the disclosure was not properly made in accordance with its policies.

### MEDIATION continued from page 2

Our firm can provide more information about mediation generally as well as the *Mandatory Mediation Program*. 

<sup>1</sup>You can learn more about Ontario's Mandatory Mediation Program by visiting the Attorney

### DISMISSAL continued from page 3

With respect to the punitive damage award, the court also indicated that one must ask whether "the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution," in cases where damages for conduct in dismissal are awarded.

#### The Decision in Honda

The Supreme Court agreed that Keays had been wrongfully dismissed and that the award of 15 months notice should be maintained. However, the evidence did not support the trial judge's findings that Honda had behaved egregiously when it dismissed Keays. Rather, its request for a meeting between Keays and its medical specialist was normal in the circumstances. For this reason, the additional 9 months was disallowed. For similar reasons, the punitive damages were also disallowed.

The judge further found that had Temple and Donovan known that the agent making the offer worked out of the same office as Lindsay and was seeking to purchase the property for her husband, they might have chosen to seek independent advice. Given that these facts were material facts, it was irrelevant whether Temple and Donovan would have done anything differently had they been given complete disclosure.

The result of this failure in her fiduciary obligation was that Lindsay had to forfeit her commission. 

General's website [attorneygeneral.jus.gov.on.ca](http://attorneygeneral.jus.gov.on.ca) Under Court Services click on the "more..." link

<sup>2</sup>Case management is a system in which the court supervises cases and imposes strict timelines on their movement through the pretrial and trial process.

### The Lessons

If you are an employee who is experiencing a period of disability it is important to cooperate with your employer's reasonable requests for medical information.

If you are an employer you should always strive to treat your employees fairly and with dignity. If an employee chooses to hire a lawyer, do not tell your employee that this course of action is a mistake or that it will make things worse. It is likely to be perceived as a way of undermining the advice of the employee's lawyer.

If you require assistance or further information concerning employment law please contact our firm. 

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